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ALEXANDER L. STEVAS,
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No.

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1983

ROBERT K. BELL ENTERPRISES, INC.,

Petitioner

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
ET AL,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR CERTIORARI

Bradford S. Baker
702 Atlas Life Building
Tulsa, Oklahoma 74103
(918) 585-1185

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Must an employer exhaust its' administrative remedies under the Occupational Safety and Health Act, 29 USC §651 et seq before said employer may challenge in a United States District Court the constitutionality of a warrant issued by the United States Magistrate of said District Court?

2. In the exercise of its' equitable power, should a United States District Court refrain from granting relief to an employer seeking a declaratory judgment as to the constitutionality of a warrant issued by the United States Magistrate of said District Court?

3. When OSHA representatives attempt an inspection without a warrant but are denied entry, application is made and a warrant is obtained from a United States Magistrate, an inspection is then permitted and made pursuant to the warrant, the

Secretary of Labor issues a citation as a result of the inspection, the employer files a timely notice of contest, and the Secretary of Labor then files a complaint, when was the administrative process commenced?

4. At what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without having first to exhaust administrative remedies?

5. If exhaustion of administrative remedies is required, what remedy does an employer have against unconstitutional OSHA inspections and unconstitutional warrants issued by a United States Magistrate if the Secretary of Labor elects not to initiate any administrative citation proceedings or elects to later dismiss such proceedings, or if such proceedings are dismissed on grounds other than the validity or constitutionality of the warrant,

thereby precluding any review of the actions of the Secretary of Labor or the United States Magistrate by the Occupational Safety and Health Review Commission or the United States Court of Appeals under 29 USC §660?

PARTIES TO PROCEEDING IN COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Tenth Circuit were:

ROBERT K. BELL ENTERPRISES, INC.,
Plaintiff-Appellant,

RAYMOND J. DONOVAN, Successor to Ray Marshall, Secretary of Labor, United States Department of Labor; EULA BINGHAM, Assistant Secretary of Labor, United States Department of Labor, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION of the United States Department of Labor; JAMES P. JOHNSON, OSHA Acting Area Director; DERL W. HOUGHTON, OSHA Compliance Officer; and the OCCUPATIONAL SAFETY and HEALTH REVIEW COMMISSION, Defendants-Appellees.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, see Appendix A, is officially reported at 710 F. 2d 673 (1983). The judgment of the United States District Court for the Northern District of Oklahoma is not officially reported; however, it is unofficially reported at CCH 1981 OHSD \$25,433 and is attached as Appendix C.

JURISDICTION

The opinion and judgment of the Tenth Circuit Court of Appeals was rendered on June 20, 1983. On July 1, 1983 Robert K. Bell Enterprises, Inc. filed its Petition for Rehearing. On July 27, 1983, the Tenth Circuit Court of Appeals entered its Order denying Appellant's Petition for Rehearing. See Appendix B. The jurisdiction of this Court rests on 28 USC §1254.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The inspection in this case was purportedly conducted under Section 8(f)(1) of the Occupational Safety and Health Act of 1970, 29 USC §657(f)(1), which provides:

(f)(1) Any employees or representative of employees who believe that a violation of a safety or

health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary of his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section.

If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

The enforcement procedures and preservation of judicial review were conducted under 29 USC §659 (a), which provides:

(a) If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a rea-

sonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within, fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to

review by any court or agency.

Judicial review is provided for in
29 USC §660(a) which provides:

(a) Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the

court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the

failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it

shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28. Petitions filed under this subsection shall be heard expeditiously.

STATEMENT OF THE CASE

On June 14, 1978, OSHA was denied permission to conduct an inspection without a warrant at Bell's Amusement Park in Tulsa, Oklahoma. On August 24, 1978, OSHA applied to a United States Magistrate for the Northern District of Oklahoma for a warrant. The application did not reveal to the Magistrate anything about the person making a complaint about Bell's. On August 24, 1978, the United States Magistrate issued a warrant authorizing OSHA to inspect the entire premises and records of Bell's. Pursuant to the warrant, Bell's allowed the inspection.

On August 30, 1978, OSHA issued a citation alleging violations. On September 15, 1978, Bell's gave its Notice of Contest of said citation to the OSHA area director in Tulsa, Oklahoma. Bell's never filed any preliminary motions or answers and never participated in any administra-

tive hearings or negotiations.

Bell's filed a complaint in the Northern District of Oklahoma seeking, among other things, a declaratory judgment under 28 USC §2201 that the inspection warrant and inspection were unconstitutional. The basis for federal jurisdiction in this court of first instance was 28 USC §1331, 1337, 1346 (a)(2), 29 USC §651 et seq., the Fourth Amendment to the Constitution of the United States and Article 3, Section 2 of the Constitution of the United States.

The Occupational Safety and Health Review Commission stayed administrative proceedings pending a decision by the district court.

OSHA moved to dismiss Bell's complaint, alleging lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted on the grounds that the warrant was valid as a matter of law. All parties filed opposing

briefs.

A hearing was held before the United States Magistrate assigned to the case who on April 24, 1979, found that OSHA's motion to dismiss should be sustained for lack of jurisdiction. See Appendix D. Bell's petitioned to set aside said findings and recommendations and both parties filed briefs.

On August 10, 1979, the district judge to whom the case had been transferred issued an order abating the case pending the decision of the Tenth Circuit Court of Appeals in Marshall v. Horn Seed Co., Inc., 647 F 2d 96 (10th Circuit 1981).

On May 20, 1981, a different district judge to whom the case had been transferred entered a final order adopting the findings of the United States Magistrate, sustaining defendant's motion to dismiss and dismissing plaintiff's complaint, concluding that Bell's must exhaust its administrative remedies before it could challenge the constitutional-

ty of a warrant and inspection. See Appendix C. The magistrate and the court failed to find that Bell's sought a declaratory judgment under 28 USC §2201 even though Bell's specifically referred to said statute and prayed for a judgment declaring the warrant and inspection unconstitutional.

The magistrate and the court found that Bell's notice of contest invoked the jurisdiction of the OSHRC and implied that Bell's could have brought its action in the court below had Bell's not filed its Notice of Contest with the OSHA area director.

Bell's timely appealed to the Tenth Circuit Court of Appeals.

Meanwhile, Bell's motion for a stay pending appeal having been denied, the OSHRC lifted its stay of the administrative proceedings and OSHA proceeded to press its administrative action against

Bell's. An administrative hearing was ultimately held and the administrative law judge ordered the citation against Bell's vacated on the ground that the Secretary of Labor failed to show jurisdiction over Bell's as an employer effecting interstate commerce. The Secretary appealed that order to the OSHRC where the matter is now pending.

On June 20, 1983, the Tenth Circuit Court of Appeals affirmed the decision of the district court and on July 27, 1983 entered its order denying Bell's timely petition for rehearing. See Appendix A and B.

In Bell's complaint in the district court which is the subject matter of this appeal, Bell's raised no issues of fact but only issues of law, namely, the constitutional issues of law as to the validity of the warrant and inspection.

In affirming the district court,

the Tenth Circuit Court of Appeals held what it considered a majority of circuit courts have held, namely, "that a district court should decline to exercise jurisdiction where the administrative process has been commenced, and that the employer should await final administrative action and then obtain judicial review by the appropriate Court of Appeals."

Bell's now petitions this court to grant certiorari to review and determine whether or not an employer must exhaust its administrative remedies or a district court should refrain from granting relief in the exercise of its equitable power when the employer is seeking a declaratory judgment as to the constitutionality of a warrant issued by a magistrate of said district court, for this court to review and determine when the administrative process has in fact been commenced and

then at what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without having first to exhaust administrative remedies, and for this court to review and determine what remedy an employer has against unconstitutional inspections and warrants if the employer must exhaust administrative remedies and the issue of the warrant's validity is lost along the administrative pathway.

REASONS THE WRIT SHOULD BE GRANTED

A. The Tenth Circuit Court of Appeals has rendered a decision in this case which is in conflict with the decision of another federal court of appeals on the same matter. The Seventh Circuit Court of Appeals has held that an employer must not exhaust its administrative remedies prior to obtaining judicial relief from a United States District Court where the employer is challen-

ging the validity of an inspection warrant on constitutional grounds, and that the district court has inherent jurisdiction to review the constitutionality of its own magistrates warrant, either before or after it is executed. Weyerhaeuser v. Marshall, 592 F 2d 373 (Seventh Circuit 1979).

The Tenth Circuit Court of Appeals has rendered a decision also in conflict with the First Circuit which required exhaustion of administrative remedies because there were questions of statutory interpretation needing a factual record before the OSHRC and because the employer had not made a sufficiently clear showing of a Fourth Amendment violation to justify extraordinary relief. In re Worksite Inspection of Quality Products, 592 F 2d 611 (First Circuit 1979). In this case there was no question of statutory construction or any factual issue requiring

an administrative record and Bell's had made a clear showing of a Fourth Amendment violation.

The affidavit requesting the warrant did not state whether the complaint was received by the affiant or by some other OSHA official. The affidavit does not inform the magistrate as to the source of the complaint or even whether or not the source of the complaint was an employee. The complaint was not attached to the affidavit and application for the warrant. The application requested and the warrant authorized the inspection of the entire premises and all the records. These are clearly violations of Bell's Fourth Amendment rights. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Marshall v. Hornseed Co., Inc., 647 F 2d 96 (Tenth Circuit 1981).

The Tenth Circuit Court of Appeals has rendered a decision also in conflict

with the decisions of the Third Circuit which has held that employers need not first exhaust administrative remedies unless a factual record is necessary. Dravo Corporation v. Marshall, 5BNA OSHC 2057 (W.D. Pa., 1977), aff'd 578 F 2d 1373 (Third Circuit 1978); Babcock v. Marshall, 610 F 2d 1128 (Third Circuit 1979); Marshall v. North American Car Co., 626 F 2d 320 (Third Circuit 1980); and Susquehanna Valley Alliance v. Three Mile Island, 619 F 2d 231 (1980).

It is not necessary to develop a factual record to aid in determining the constitutional validity of a warrant. In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge. Spinelli v. United States, 393 U.S. 410, 413 n. 3 (1969).

Therefore, the Writ of Certiorrai should be granted since the Tenth Circuit

Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

B. The Tenth Circuit Court of Appeals has decided an important question of federal law which to the courts of appeals apparently has not been, but should be, settled by this court. In addition to the above cases with different holdings on the same matter, there are three other circuits which have expressed various findings and holdings with regard to similiar issues. Baldwin Metals Co. vs. Donovan, 642 F 2d 768, 771 (Fifth Circuit 1981); Marshall vs. Central Mine Equipment Co., 608 F 2d 719 (Eighth Circuit 1979); In the Matter of J. R. Simplot Co., 640 F 2d 1134 (Ninth Circuit 1981). For example, the Fifth Circuit (Baldwin, supra) agrees with the Seventh Circuit (Weyerhaeuser, supra) that

a factual record is not required and that the interest of agency expertise also does not require exhaustion of administrative remedies, but then disagrees with the Seventh Circuit and claims that the constitutional issues may be mooted by an OSHA decision in favor of the employer.

Thus, the Tenth Circuit Court of Appeals has decided an important question of federal law which, at least in the eyes of the circuits, has not been, but should be settled by this court, and thus the writ should be granted.

C. The Tenth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court.

This court has held that a company has a Fourth Amendment right to conduct its business free of unreasonable administrative inspections. Michigan v. Tyler, 436 U.S. 499, 504, 505 (1978); Marshall v.

Barlow's, Inc., supra; and See v. Seattle,
387 U.S. 541 (1967).

This court has held that United States District Courts have jurisdiction and complainants do not have to exhaust their administrative remedies where the only issues presented are constitutional questions of fundamental law. Public Utilities Commission v. United States, 355 U.S. 534, at 539, 2 L.Ed. 2d 470 (1958).

Exhaustion may be required only when (1) it is necessary to develop a factual record to aid in determining a constitutional question; (2) the agency decision may make the constitutional issue moot; (3) specialized and complex issues require application of agency expertise; and (4) the agency should be given a chance to correct its own errors. McKart v. United States, 395 U.S. 185, (1969).

It is not necessary to develop a factual record to aid in determining the

constitutional validity of a warrant. In ruling on the validity of a search warrant, the reviewing court may only consider the information provided the issuing magistrate or judge. Spinelli v. United States, 393 U.S. 410, 413 n. 3 (1969).

The agency decision cannot make the constitutional issue moot. Regardless of the agency decision, the constitutional issue of whether or not there was a violation of the Fourth Amendment would be determinative of whether or not the federal agent was liable for damages consequent upon his unconstitutional conduct. Bivens vs. Six Unknown Federal Agents, 403 U.S. 388, 389 (1971).

Furthermore, a declaratory judgment that a warrant and a search pursuant thereto are in violation of the Fourth Amendment to the Constitution of the United States serves many very important purposes. It not only informs the employer that he does

not have to permit the same unlawful intrusion on private property in the future, but it informs and hopefully deters government inspectors and U.S. Magistrates from authorizing and conducting illegal searches. The decision of this court in Barlow's, supra, was a declaratory judgment.

This court has not found specialized and complex issues requiring application of agency expertise in determining the necessity for and requirements of an inspection warrant. Marshall v. Barlow's, Inc., supra, Camara v. Municipal Court, 387 U.S. 523, 528, 18 L.ed 2d, 930, 87 S.Ct. 1727 (1967); See v. Seattle, supra.

This court did not give the Secretary of Labor a chance to correct its own errors in Marshall vs. Barlow's, Inc., supra.

Furthermore, part of the error committed lies with the United States Magistrate who issued the unlawful warrant and it is the responsibility of the courts, ultimate-

ly this court, to correct such an error by holding that the warrant and inspection pursuant thereto were in violation of the rights of Bell's under the Fourth Amendment to the Constitution of the United States.

D. The issues herein are important questions of federal law.

An employer has a Fourth Amendment right to conduct his business free of unreasonable administrative inspections. An employer needs to know what procedure he can and cannot follow in order to have a court determine whether or not his Fourth Amendment rights have been violated. At what point and under what circumstances can an employer obtain judicial review of an unconstitutional warrant without first exhausting administrative remedies. What actions by an employer preclude an employer from obtaining such judicial review prior to exhaustion of administrative remedies

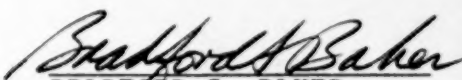
and make the administrative process the exclusive remedy. Must an employer refuse an inspection even with the warrant and risk contempt in order to insure judicial review of an unconstitutional warrant? When does the administrative process commence and if exhaustion of administrative remedies is required, what remedy does an employer have against unconstitutional warrants if the constitutional issue is lost in the administrative process? Must an employer exhaust its administrative remedies when the only issue he is raising is the fundamental question of law concerning the unconstitutionality of the warrant?

CONCLUSION

The Tenth Circuit Court of Appeals has rendered a decision directly in conflict with the Seventh Circuit on the same matter; the Tenth Circuit has deci-

ded an important question of federal law concerning Fourth Amendment rights in a way in conflict with applicable decisions of this Court but which in the eyes of the circuit courts has not been, but should be, settled by this Court.

Respectfully submitted,


BRADFORD S. BAKER
Attorney for Petitioner
702 Atlas Life Bldg.
Tulsa, Oklahoma 74103
(918) 585-1185

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished to the following counsel of record and Solicitor General by United States mail, on this 14 day of Oct, 1983:


Mr. James E. Culp, Mr. James E. White, Mr. T. Timothy Ryan, Jr., Mr. Frank A. White, Mr. Allen H. Feldman, Mr. Charles I. Hadden,

U. S. Department of Labor, Office
of the Solicitor, 200 Constitution
Ave., N.W., Room S-4004, Washington,
DC 20210

Mr. Frank Keating, U.S. Attorney,
Ms. Paula S. Ogg, Mr. Philard L.
Rounds, Jr., Assistants, 460 U.S.
Courthouse, Tulsa, Oklahoma 74103

Mr. Paul A. LaFranchise, Sr., U.S.
Occupational Safety & Health Review
Commission, 1825 K Street, N.W.,
Suite 601, Washington, DC 20006

Solicitor General, Department of
Justice, Washington, DC 20530



BRADFORD S. BAKER

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-1677

ROBERT K. BELL)
ENTERPRISES, INC.,)
an Oklahoma)
corporation,)
)
 Plaintiff-)
 Appellant,)
)
vs.)
)
RAYMOND J. DONOVAN,)
Successor to Ray)
Marshall, Secretary)
of Labor, et al,)
)
 Defendants-)
 Appellees.)

Appeal from the United States District
Court For the Northern District of
Oklahoma
(D.C. No. 78-C-545-E)

June 20, 1983
Rehearing Denied July 27, 1983

Bradford S. Baker of Tips, Gibson, Crewson & Baker, Tulsa, Oklahoma, for Plaintiff-Appellant.

James E. Culp, Attorney (James E. White, Regional Solicitor; T. Timothy Ryan, Jr., Solicitor of Labor; Frank A. White, Associate Solicitor for Occupational Safety and Health; Allen H. Feldman, Counsel for Appellate Litigation; and Charles I. Hadden, Assistant Counsel for Appellate Litigation; with him on the brief), U. S. Department of Labor, Washington, D. C., for Defendants-Appellees.

Before McWILLIAMS, BREITENSTEIN, and DOYLE,
Circuit Judges.

McWILLIAMS, Circuit Judge.

The present controversy concerns the efforts of the Occupational Safety and Health Administration to inspect the premises of Robert K. Bell Enterprises, Inc. Bell operates an amusement park in Tulsa, Oklahoma. OSHA's Tulsa area office received a complaint that there were several hazardous working conditions at Bell's park. Pursuant to 29 U.S.C. §657(f)(1), OSHA's

representatives appeared at Bell's park to conduct an inspection. Bell denied them entry. The Secretary thereafter applied to a United States Magistrate for an inspection warrant and was granted one. Pursuant to the warrant, a compliance officer appeared at Bell's premises and was permitted by company to make an inspection. As a result of its inspection, the Secretary issued a citation alleging a serious violation of the Act for failing to adequately guard pulleys and belts on its "Scrambler" ride and proposing a \$200 penalty. In response to the Secretary's citation, Bell filed a timely notice of contest. The Secretary then filed a complaint with OSHA.

It was at this juncture that Bell brought the present proceeding in the United States District Court for the Northern District of Oklahoma. Bell named the Secretary, OSHA, and several officials of OSHA as defendants and sought declaratory

judgment and injunctive relief. Specifically, Bell asked the district court to enjoin the defendants from taking further administrative action against it, and to declare that the inspection and the use of evidence derived from the inspection were in violation of Bell's Fourth Amendment rights. Upon the institution of the present action, the Review Commission stayed further administrative proceedings pending resolution of the district court proceeding instituted by Bell.

The Secretary filed a motion to dismiss Bell's action for lack of subject matter jurisdiction and failure to state a claim for which relief could be granted. This motion was granted by the district court, which declined to exercise jurisdiction because Bell had failed to exhaust its administrative remedies. Bell filed a notice of appeal from such dismissal. Bell's request for an injunction pending appeal was denied, first by the district

court and then by this Court.*

Prior to 1978, it was thought by many that 29 U.S.C. §657(a) authorized warrantless searches of plant sites by OSHA officials. The Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) held, however, that such warrantless searches violated the Fourth Amendment. Since Barlow's, OSHA officials, in the absence of consent on the part of an employer, have obtained search warrants in aid of their inspection efforts.

*We are advised by Bell's supplemental brief that after our denial of its request for an injunction pending appeal, the Secretary proceeded to press its administrative action against Bell. In connection therewith, an Administrative Law Judge ordered the citation vacated on the ground that the Secretary failed to show that Bell is an employer affecting interstate commerce. The Secretary has appealed that order to the Review Commission, where, insofar as we are advised, that matter is now pending.

The courts have, thereafter, been faced with the recurring problem of when, where, and how challenges to OSHA search warrants may be made. We are here faced with such problem.

As above indicated, the district court in the instant case declined to exercise jurisdiction, holding that under the circumstances Bell should exhaust its administrative remedies. In this regard, the district court noted that the administrative remedy here provided by Congress was a comprehensive scheme of review which afforded Bell an adequate administrative remedy, and then provided for judicial review of final administrative orders by the appropriate Court of Appeals. 29 U.S.C. §660. In so holding, we find no error on the part of the trial court.

The majority of circuit courts considering this matter have held, as did the

district court in the instant case, that a district court should decline to exercise jurisdiction where the administrative process has been commenced, and that the employer should await final administrative action and then obtain judicial review by the appropriate Court of Appeals. Such holdings have been based on either of two grounds: (1) failure to exhaust administrative procedures; or (2) in the exercise of its equitable power, a district court, under the circumstances, should refrain from granting relief. In support of the foregoing, see such cases as: Baldwin Metals Co., Inc. v. Donovan, 642 F.2d 768 (5th Cir.), cert. denied, 454 U.S. 893 (1981); Matter of J. R. Simplot Co., 640 F.2d 1134 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982); Marshall v. North American Car Co., 626 F.2d 320 (3rd Cir. 1980); Babcock and Wilcox Co. v. Marshall, 610 F.2d 1128 (3rd Cir. 1979); Marshall v.

Central Mine Equipment Co., 608 F.2d 719 (8th Cir. 1979); In re Worksite Inspection of Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979). We are in accord with the result and rationale of these cases, and on that basis, we affirm. Bell's efforts to distinguish those cases from the instant one are not persuasive. Bell also suggests that we follow the rationale of, and the result reached in, Weyerhaeuser Co. vs. Marshall, 592 F.2d 373 (7th Cir. 1979). We prefer to follow the rule of the other cases above cited.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 81-1677

May Term - July 27, 1983

Before Honorable Oliver Seth, Honorable
Jean S. Breitensein, Honorable Robert H.
McWilliams, Honorable James E. Barrett,
Honorable William E. Doyle, Honorable
Monroe G. McKay, Honorable James K. Logan,
Honorable Stephanie K. Seymour, Circuit
Judges

ROBERT K. BELL ENTERPRISES, INC.,)
an Oklahoma corporation,)

Plaintiff-Appellant,)

vs.)

RAYMOND J. DONOVAN, Secretary of)
Labor, United States Department of)
Labor; EULA BINGHAM, Assistant)
Secretary of Labor, United States)
Department of Labor, OCCUPATIONAL)
SAFETY AND HEALTH ADMINISTRATION)
of the United States Department of)
Labor; JAMES P. JOHNSON, OSHA)
Acting Area Director; DERL W.)
HOUGHTON, OSHA Compliance Officer;)
and the OCCUPATIONAL SAFETY AND)
HEALTH REVIEW COMMISSION,)

Defendants-Appellees.)

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS,
Clerk

By Robert L. Hoecker
Chief Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT K. BELL)
ENTERPRISES, INC.,)
)
 Plaintiff,)
)
vs.)
)
RAY MARSHALL,)
Secretary of Labor,)
United States)
Department of Labor,)
et al.,)
)
 Defendants.)

No. 78-C-545-E

ORDER

This case involves the validity of an OSHA inspection warrant. The Tulsa area office of OSHA sent a compliance officer to inspect Plaintiff's amusement park on June 14, 1978, but the officer was refused permission to conduct his inspection. The compliance officer then applied to U. S. Magistrate Claudine S. Barnes for an inspection warrant, which was issued on August 24, 1978. That same day, the officer returned to Plaintiff's

place of business, and was allowed to conduct his inspection pursuant to the warrant. Shortly after the completion of the inspection, on August 30, 1978, the Secretary issued a citation to Plaintiff alleging that certain unsafe conditions existed. Plaintiff duly contested the citation before the OSHRC. On November 2, 1978, Plaintiff instituted this action, alleging the inspection warrant was unlawful and in violation of the Fourth Amendment, and requesting that the warrant be quashed and that any information or evidence obtained therefrom be suppressed. Plaintiff also sought to have the Defendants enjoined from taking any further action with regard to the inspection warrant, the inspection, any information or evidence received therefrom, the citation, the penalty notice, and the administrative action. On November 20, 1978, Defendants filed their motion to dismiss. On November 22, 1978, the OSHRC

stayed the administrative proceedings pending a decision by this Court. On that same date, the matter was referred to U. S. Magistrate Robert Rizley, for findings and recommendations on Defendant's motion. These were filed on April 24, 1979. The Magistrate recommended that the motion to dismiss should be sustained. Plaintiff duly objected to the findings and recommendations of the Magistrate.

On August 10, 1979, this action was stayed pending the Tenth Circuit's decision in Marshall v. Horn Seed Co., No. 79-1501. That decision was rendered on April 7, 1981, and clarifies in this Circuit the standards by which such warrants are to be measured.

The question which the Court now confronts, however, is a narrow one: under the circumstances of this case, must the Plaintiff exhaust its administrative remedies before it may challenge the constitutionality of an OSHA inspection? It is the Court's

conclusion that Plaintiff must.

Six Circuits have considered this question, and five have determined that in cases such as this exhaustion is required, and the district court should refrain from exercising its jurisdiction. See Baldwin Metals Co. v. Donovan, 642 F.2d 768 (Fifth Cir. 1981); Matter of J. R. Simplot Co., 640 F.2d 1134 (Ninth Cir. 1981); Marshall v. North American Car Co., 626 F.2d 320 (Third Cir. 1980); Babcock & Wilcox Co. v. Marshall, 610 F. 2d 1128 (Third Cir. 1979); Marshall v. Central Mine Equipment Co., 608 F.2d 719 (Eighth Cir. 1979); In re Worksite Inspection of Quality Products, 592 F. 2d 611 (First Cir. 1979); but see Weyerhaeuser Co. v. Marshall, 592 F. 2d 373 (Seventh Cir. 1979).

After an examination of these cases, in light of the comprehensive scheme of review and the administrative process created by Congress for matters of this type,

this Court concludes that the better reasoned approach is for the district court to decline to exercise its jurisdiction, leaving the Plaintiff to pursue his claims through the administrative process and the Court of Appeals.

It is, therefore, the decision of this Court that the Plaintiff's objection to the findings and recommendations of the Magistrate be overruled, and the Court hereby adopts the recommendations of the Magistrate, as supplemented by the authority cited herein.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss be, and the same hereby is, sustained, and this action is hereby dismissed.

It is so Ordered this 20th day of May, 1981.

JAMES O. ELLISON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT K. BELL)	
ENTERPRISES, INC.,)	CIVIL ACTION FILE
an Oklahoma)	
corporation,)	
)	
Plaintiff,)	
)	
vs.)	No. 78-C-545-D
)	
RAY MARSHALL,)	
Secretary of Labor,)	
United States)	
Department of Labor;)	
EULA BINGHAM,)	
Assistant Secretary)	
of Labor, United)	
States Department)	
of Labor; OCCUPA-)	
TIONAL SAFETY AND)	
HEALTH ADMINISTRA-)	
TION of the United)	
States Department)	
of Labor; JAMES P.)	
JOHNSON, OSHA)	
Acting Area Direc-)	
tor; DERL W. HOUGH-)	
TON, OSHA Compli-)	
ance Officer; and)	
the OCCUPATIONAL)	
SAFETY AND HEALTH)	
REVIEW COMMISSION,)	
)	
Defendants.)	

FINDINGS AND RECOMMENDATIONS
OF THE MAGISTRATE

This cause came for hearing on the
5th day of March, 1979, upon the Defen-

dant's Motions to Dismiss. The Plaintiff appeared by its attorney, Bradford S. Barker, and the Defendants appeared by their attorneys, George C. Carrasquillo, Assistant United States Attorney; Robert C. Gombar, General Counsel, Occupational Safety and Health Review Commission; and Eloise Vellucci, Attorney, Solicitor's Office, United States Department of Labor.

For the reasons stated herein, the Magistrate finds that the Motions to Dismiss of Defendant Occupational Safety and Health Review Commission and Defendants Secretary of Labor, et al., should be sustained.

This action is brought under 28 U.S.C. §1331, 1337, 1346(a)(2). Venue lies within the Northern District of Oklahoma under 28 U.S.C. § 1391 (e)(2).

Plaintiff, Robert K. Bell Enterprises, Inc., is the operator of an amusement park in Tulsa, Oklahoma. Defendants, Ray Marshall, Eula Bingham, Occupational Safety

and Health Administration ("OSHA"), James P. Johnson, and Derl W. Houghton, are in varying degrees, statutorily responsible for monitoring the workplaces of employers to assure compliance with occupational safety and health standards issued pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Defendant Occupational Safety and Health Review Commission ("Commission") is an independent executive agency, separate from the Department of Labor, charged with "carrying out adjudicatory functions under the Act." 29 U.S.C. §651 (b) (3).

Compliance officers representing the Secretary of Labor ("the Secretary") are authorized to inspect workplaces and issue citations if they believe that an employer has violated a provision of the Act or a regulation promulgated thereunder. 29 U.S.C. §§ 657 (a), 658 (a), 659 (a). These inspections, to be constitutionally

valid, must, in the absence of employer consent, be conducted with an inspection warrant. Marshall vs. Barlow's, Inc., 436 U.S. 307 (1978).

A cited employer has fifteen working days from receipt of a citation and notification of a proposed penalty in which to notify the Secretary that he wishes to exercise his right to contest all or part of the Secretary's enforcement action. 29 U.S.C. §659 (a). An employer's election to exercise his right to contest initiates a proceeding before the Commission. 29 U.S.C. § 659 (c).

Once a citation is timely contested, it is docketed and the parties are given the opportunity for a hearing before an administrative law judge of the Commission. §§ 659 (c), 661. After the hearing, the administrative law judge is required to issue a report "based on findings of fact, affirming, modifying or vacating the Sec-

retary's citation of proposed penalty, or directing other appropriate relief." 29 U.S.C. §§ 659 (c), 661 (i). The administrative law judge's decision becomes a final order of the Commission thirty days after the filing of the report with the Commission, unless within that time a Commission member directs that the decision be reviewed by the full Commission. 29 U.S.C. § 661 (i).

After the Commission has issued a final order, either in the form of an unreviewed judge's decision or a final order of the full Commission upon review, "any person adversely affected or aggrieved" by that order may obtain review by filing a petition within sixty days in an appropriate United States court of appeals within sixty days after service of the Commission's order. 29 U.S.C. §660 (b).

In the present case, the Tulsa Area

Office of OSHA sent a compliance officer to conduct an inspection of Plaintiff's amusement park. On June 14, 1978, the compliance officer attempted to inspect Plaintiff's workplace, but was refused permission to conduct an inspection.

On August 24, 1978, the compliance officer applied for and obtained an inspection warrant issued by U. S. Magistrate Claudine S. Barnes. On that day, the compliance officer returned to Plaintiff's workplace and was permitted to conduct an inspection of Plaintiff's workplace.

On August 30, 1978, the Secretary issued a citation to Plaintiff alleging that numerous unsafe conditions were discovered during the inspection. Plaintiff filed a timely notice of contest on or about September 16, 1978, thus invoking jurisdiction of the Commission.

On November 2, 1978, Plaintiff filed

the present action, alleging that the inspection warrant was unlawful and in violation of the Fourth Amendment, and that all evidence from the inspection was illegally obtained. Plaintiff requests that the warrant be quashed, that any evidence obtained during the search be suppressed, and that a permanent injunction be issued restraining Defendants from taking any further action with respect to the warrant, the search, any evidence obtained therefrom, or the citation.

On November 22, 1978, the Commission stayed the administrative proceedings in this case pending a decision by this Court.

In their Motions to Dismiss, the Defendants urge that Plaintiff should litigate before the Commission rather than in district court its claim regarding the validity of the warrant. In essence, Defendants argue that the statutorily-created review procedure is adequate to handle

the matter at issue and that this Court is not presented with the type of exceptional circumstances required to warrant an interference with the administrative remedy. In addition to administrative exhaustion arguments presented by all Defendants, the Secretary of Labor also argues for the validity of the underlying warrant. Since the Commission considers the question of the warrant's validity to be before it for decision, it takes no position on this latter argument.

Where a particular action sought to be reviewed falls within the special expertise of an administrative agency, that agency should be given the opportunity to exercise its jurisdiction to decide the issue. See Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963). This is so notwithstanding the presence of constitutional questions in the case. Human Resources Management, Inc. vs. Weaver, 442

F. Supp. 241 (D.D.C. 1977).

In its capacity as the central forum for adjudications under the Act, the Commission is authorized to pass on all factual and statutory defenses available against the enforcement actions of the Secretary. Matter of Restland Memorial Park, 540 F 2d 626 (3d Cir. 1976). The challenges raised by Plaintiff constitute defenses that fall within this ambit of Commission authority. Moreover, Plaintiff has invoked the jurisdiction of the Commission by filing its notice of contest. Where Commission proceedings are in progress, the Tenth Circuit has recognized that the proper method for judicial review of challenges to the validity of an OSHA inspection is upon review of a final Commission order. Robberson Steel Co. v. Marshall and O.S.H.R.C., No. 78-1350 (10th Cir., October 30, 1978).

Plaintiff's challenges to the warrant

and the manner of the inspection can be adequately considered in the statutory enforcement proceeding either by the Commission or by the appellate court during a review of the Commission decision. Quality Products, Inc., No. 78-1232 (1st Cir., Feb. 16, 1979). Furthermore, since there are no extraordinary circumstances in this case warranting district court review, the court should defer review of this matter to the Commission. See Quality Products, Inc., supra; Nader v. Volpe, 466 F 2d 261 (D.C. Cir. 1972).

It is therefore recommended that the Defendant's Motions to Dismiss be sustained.

Dated this 24th day of April, 1979.

ROBERT S. RIZLEY
United States Magistrate